No. 663

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Supreme Court of the United States

October Term, 1932

THE STATE OF WASHINGTON on the relation of BOND & GOODWIN & TUCKER, INCORPORATED, a dissolved Delaware corporation,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY AND HONORABLE JOSEPH B. LINDSLEY, Judge thereof,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLEES

PARKER W. KIMBALL,
Counsel for Appellees.

A. W. WITHERSPOON,
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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLEES

STATEMENT OF THE CASE.

In considering the case the following facts should be borne in mind from the outset:

Bond & Goodwin & Tucker, Inc., a Delaware corporation, made application to be admitted to do business in the State of Washington, on April 9, 1926, and qualified to do business therein by filing the necessary certified copies of its articles of incorporation, paying license fee and appointing Duncan Shaw, of Seattle, Washington,

as its resident agent for the purpose of accepting service of process under the laws of that state. It did business in the State of Washington and was doing business in Spokane County in said State at the time these causes of action arose. This suit was brought by the plaintiff, as assignee of numerous persons, for damages arising from the sale by Bond & Goodwin & Tucker, Inc. of Vancouver Kraft Co., Ltd. bonds.

On or about November 29, 1929, said Bond & Goodwin & Tucker, Inc. withdrew from the State of Washington, ceased to transact any business therein, and on December 5, 1929, caused a formal notice of its withdrawal to be filed with the Secretary of State of the State of Washington. On or about said date said Bond & Goodwin & Tucker, Inc. was dissolved under the laws of the State of Delaware, and on December 11, 1929, a certificate of dissolution was issued by the Secretary of State of the State of Delaware. Duncan Shaw removed from the State of Washington to the State of California during the year 1929, and no one was appointed as statutory agent in his place subsequent to his removal from the State of Washington to California. The alleged fraud of Bond & Goodwin & Tucker, Inc. in the sale of bonds and upon which this suit is based was not discovered by any of the owners of such bonds until after May 15, 1931, and suit by reason of the alleged fraud of Bond & Goodwin & Tucker, Inc. was instituted in Spokane County in April, 1932.

ARGUMENT

SECTIONS OF STATUTE MUST BE CONSTRUED TOGETHER.

In order to properly construe Section 3854 of Remington's Compiled Statutes of Washington, under which the disputed service of process was made, it is necessary that Sections 3852 and 3853 be also borne in mind. These sections are set out in full (Appendix p. 1), and only the pertinent portions of said sections will be set out in the argument. Section 3852 reads in part as follows:

> "Any corporation incorporated under the laws of any state or territory in the United States, or of any foreign country, state, or colony, for any of the purposes for which domestic corporations are authorized to be formed under the laws of this state, shall have full power and is hereby authorized to sue and to be sued in any court having competent jurisdiction, to acquire, purchase, hold, mortgage, sell, convey, or otherwise dispose of, in the corporate name, all real estate or personal property necessary or convenient to carry into effect the objects and purposes of its corporation, and also any interest in real estate, by mortgage or otherwise do (due) to or loans made by such foreign corporations within the boundaries of this state, either prior to or after the passage of this act, and generally do and perform every act and transact every kind of business within this state in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of this state, by a compliance with all the conditions prescribed by the next two

> succeeding sections of this chapter: Provided, however, that this chapter shall not be (so) construed as to allow such foreign corporation to transact business within the state on more favorable conditions than are prescribed by law for a similar corporation organized under the laws of this state."

"The next two succeeding sections of this chapter" referred to in Section 3852, have the following provisions:

Section 3853 requires the filing of a certified copy of the articles of incorporation of the foreign corporation.

Section 3854 provides for the appointment of an agent for the purpose of *"accepting service of process"* in any action or suit pertaining to the property, business or transactions of the corporation within the state in which such corporation may be a party. That section further provides: "And such corporation shall have and keep continually some resident agent empowered as aforesaid during all the time such corporation shall conduct or carry on any business within this state, and service of any process, pleading, notice or other paper *"shall be taken and held as due service on such corporation."* Such corporation may change its agent or its principal place of business from time to time by filing and recording with the Secretary of State a new appointment, stating the change of such agent or the change of the principal place of business; and in the event such foreign corporation shall withdraw from this state and cease to

transact business therein it shall continue to keep and maintain such agent within the state upon whom service of process may be made until the statute of limitations shall have run against anyone bringing an action against such corporation, which accrued prior to its withdrawal from the state. It further provides that if the corporation should revoke the authority of its designated agent after its withdrawal and prior to the time when the statute of limitations would have run against causes of action, then in that event service of process may be had upon the Secretary of State of the State of Washington which *"shall be held as due and sufficient service upon such corporation."*

What is the purpose of that statute? It is to prevent foreign corporations doing business in the state withdrawing and failing to name some person on whom service might be had upon causes of action arising from its transactions within the state. (No contention was made by appellant in the Supreme Court of Washington, or has been made elsewhere, that the causes of action involved herein did not arise in the State of Washington while appellant was doing business in the State.)

FOREIGN CORPORATION BY COMPLYING WITH STATUTE, ENTERS INTO CONTRACT WITH STATE FOR BENEFIT OF PERSONS HAVING TRANSACTIONS WITH SUCH CORPORATION.

Under the statute before a foreign corporation can legally enter the state to transact business therein it has to comply with the conditions of these three sections. After entering the state by filing its articles of incorporation and appointing a statutory agent for the purpose of accepting process, and receiving a license as such foreign corporation, it is permitted to engage in business therein under the terms stated in Section 3854.

What was the consideration passing from the corporation in return for the right to be permitted to engage in business therein? Not alone the license fee paid at the time of filing its articles, and the annual license fee while doing business therein. The more important consideration was its agreement to "keep continually some resident agent empowered as aforesaid (that is, to accept service) during all the time such corporation shall conduct or carry on business within the state, and service of any process, pleading or notice shall be taken and held as due service on such corporation"; and its further agreement that if such corporation shall withdraw from this state and cease to transact business therein, to continue, and keep and maintain such agent within the state upon whom service of process, pleadings and papers may be made until the statute of limitations shall have run

against any causes of action which accrued prior to its withdrawal from the state.

But that is not all of its contract. It further agreed that in case it should revoke the authority of its agent after its withdrawal, and prior to the time when the statute of limitations would have run against causes of action accruing against it, *"then in that event service of process, pleadings and papers may be made upon the Secretary of State of the State of Washington, and the same shall be held as due and sufficient service upon such corporation."* In other words, it agreed that it would keep a statutory agent until all causes of action had outlawed against it. The obligation and effect of its contract was that it would name the statutory agent itself, or in case of its failure to do so, under its contract with the State, the Secretary of State would become such statutory agent.

While the corporation was engaged in business in Washington its failure to name a new statutory agent was not vital, for service could be had upon "any agent, cashier or secretary thereof."

Sec. 226 Remington's Compiled Statutes of Washington.

In other words, it is our position that upon Duncan Shaw's removal from the State, the Secretary of State became the statutory agent.

One of the interesting cases upon this point is that

of *Western Grocer Co. v. N. Y. Oversea Co.*, 206 Fed. 270. This was a suit by an Iowa corporation against a New York corporation in a California court, for damages for breach of contract, entered into and to be performed in California. At the time of the contract, defendant was qualified to do business in California and had appointed a local resident for service. At the time of the suit, the agent appointed had been withdrawn and service was made on the secretary of state, in accordance with the provisions of the California statute. In sustaining the validity of the service, the court said:

> "'It is at once apparent that, to permit a corporation to accept the benefits of this statute, and, after it had entered into contracts, to evade jurisdiction by withdrawing its agent, would be in the highest degree inequitable and unjust. * * *
>
> "Having accepted those conditions, to use the language of *Davis v. Kansas & T. Coal Co.* (C.C.), 129 F. 149, 'that section of the statute became in the nature of a contract between the company and the state.' In my opinion, it becomes more than that. I think it becomes a part of every contract which the corporation may make within the state, and which is to be performed within the state. In other words, I believe that, when defendant complied with the provisions of the California statute, those provisions are to be read into all of its contracts here, and one of those provisions is that, in the event of its withdrawal from the state, service of process can be made upon the officer provided by statute.'"

It is very interesting to note in the recent case of *King v. American Tank & Equipment Corporation*, 144

So. p. 283, (decided Nov. 11, 1932), that the Western Grocer case was referred to, and the following pertinent language was used:

> "A state has the power, if she allows a corporation to enter her confines, to determine the condition on which the entry shall be made and the right to enforce any condition so imposed. The power to exclude embraces the power to regulate, and the power to enact and enforce such regulations.
>
> "(3) When a foreign corporation undertakes to transact business in a state other than that in which it is incorporated, it submits itself to the authority of the courts of such other state and is bound by the statutory provisions respecting the method of such courts obtaining jurisdiction over it. *United Oil & Natural Gas Prod. Corp. v. United Carbon Corp.*, 171 La. 374, 131 S. 52."

There is no difference in principle between the facts in the case at bar and *Penn. Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U. S. 93, cited by appellant and referred to later. In the Penn. Fire Ins. Co. case the consent to have the insurance commissioner act as statutory agent, was in writing and filed at the time the corporation was permitted to commence business in the state. In the case at bar the contract was entered into by virtue of filing the certified copies of appellant's articles of incorporation and appointing an agent under Sec. 3854. All of Sec. 3854 became a part of the contract between appellant and the State of Washington.

Such stipulations are recognized by several of the decisions of this Court as being contractual.

In *Mutual Reserve Life Insurance Co. v. Phelps*, 190 U. S. 147, the Court used the following language:

> "This and other kindred statutes enacted in various States indicate the purpose of the State that foreign corporations engaging in business within its limits shall submit the controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek for the purpose of enforcing his claims the State in which the corporation has its home. Many of those statutes simply provided that the foreign corporation should name some person or persons upon whom service of process could be made. The insufficiency of such provision is evident, for the death or removal of the agent from the State leaves the corporation without any person upon whom process can be served. In order to remedy this defect some States, Kentucky among the number, have passed statutes, like the one before us, providing that the corporation shall consent that service may be made upon a permanent official of the State, so that the death, removal or change of officer will not put the corporation beyond the reach of the process of the courts. It would obviously thwart this purpose, if this association, having made, as the testimony shows it had made, a multitude of contracts with citizens of Kentucky, should be enabled, by simply withdrawing the authority it had given to the insurance commissioner, to compel all these parties to seek the courts of New York for the enforcement of their claims."

In *Hunter v. Mut. Reserve Life Ins. Co.*, 218 U. S. 573, the Court used the following language:

> "This general language must be considered in reference to the case, a conclusion which is justified

by the decision of the court in *Moore v. Mutual Reserve*, 129 N. C. 31, where it is said that the State, having the right to prescribe the terms upon which the insurance company might carry on its business in the State, and the company, 'being permitted, proceeded to make contracts with the citizens of the State, and became liable to them under these contracts. One of the provisions upon which the defendant was allowed to do business here was that James R. Young, insurance commissioner, and his successors in office should be constituted its agent, upon whom service of process might be made, and that said agency should continue so long as the defendant had any liabilities remaining unsatisfied in this State arising from or out of its said business of insurance.' "

In the case of *Davis v. Kansas & Texas Coal Co.*, 129 Fed. 149 (Circuit Court W. D. Arkansas) the Court was construing the statute of Arkansas which was an amendment to the former statute, the terms of which amendment provided that in case the foreign corporation had failed to designate an agent upon whom process might be served, and who did not have an officer continuously residing in the state upon whom process might be served, service might be had upon the State Auditor, and that such service should be sufficient to give jurisdiction over the foreign corporation. The Court said:

"Up to the passage of this act a foreign corporation doing business in the state might, at its pleasure, cease to do business in the state, recall its agents, and revoke the authority conferred under the acts above referred to upon a citizen of the state upon

whom service could be made; and, this being done, no suit could be brought against it in the state. If the same is true under the provisions of the act of February 26th, to which I have just referred, what was the object and purpose of the provision authorizing service to be made upon the Auditor? The company could not withdraw the agency of the Auditor, because that was conferred by the terms of the statute, and when it did business in the state after the passage of the act of February 26, 1901, that section of the statute became in the nature of a contract between the company and the state, to the effect that service might be had upon the Auditor of State in all cases where suits accrued against the company while doing business within the state; and it is beyond the power of the defendant company to revoke that provision of the statute."

In the case of *Simon v. Southern Railway Company*, 236 U. S. 115, the Court used the following language:

"Subject to exceptions, not material here, every State has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. *Mutual Reserve Ass'n v. Phelps*, 190 U. S. 147; *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 603. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the State enacting the law."

NO CONSTITUTIONAL RIGHT OF APPELLANT WAS VIOLATED.

Appellant entered into a contract with the State of Washington to do certain things, that is, to maintain a statutory agent until all claims had outlawed, or in case of its failure, to have the Secretary of State act as its agent.

No constitutional privilege was thereby violated. Under the facts in this case the Secretary of State became appellant's agent. It had contracted to that condition. It knew it had been doing business in Washington, and that someone with whom it had dealings might see fit to sue by reason thereof. There was nothing to prevent appellant's requesting the Secretary of State to forward any process served upon it through him to its home office or turn it over to local counsel.

Assume that while Duncan Shaw was its statutory agent, suit had been brought against the appellant, that process had been served on Shaw and that he had failed to forward the process. Appellant could not have claimed that there had not been due service of process. Appellant is in no better position now to claim that there has not been due process, for at the time of service in the case at bar the Secretary of State was its statutory agent.

When appointing Shaw appellant had contracted that service of process on him would *be taken and held as due service* and had also agreed that under the facts

herein shown, service of process on the Secretary of State would be *taken and held as due and sufficient service*. There is no distinction. Under the provisions of the statute that official was appellant's statutory agent.

This case is vastly different from one in which the foreign corporation is *compelled*, as a condition of doing business in the State, to name a state official as its statutory agent. When Duncan Shaw moved from the State appellant still had its option to appoint someone else in his place, or if it saw fit, to have the Secretary of State act as its agent. It accepted this last option.

This factor of choice whereby the corporation in its own discretion might have appointed its own agent instead of submitting to the statutory appointment of the state officer effectively distinguishes the condition in question from such unconstitutional conditions as those limiting the right to sue in the Federal Courts,

Terrall v. Burke Construction Co., 257 U. S. 529;

or those burdening the property or business of the corporation outside the State.

Western Union Telegraph Co. v. Kansas, 216 U. S. 1;

Fidelity Deposit Co. v. Tafoya, 270 U. S. 426;

Frost v. Railroad Commission, 271 U. S. 583;

Hanover Fire Insurance Co. v. Carr, 272 U. S. 494;

Cudahy Packing Co. v. Hinkle, 278 U. S. 460.

SERVICE UPON SECRETARY OF STATE UNDER FACTS IN THIS CASE CONSTITUTES "DUE PROCESS OF LAW."

Appellant has defined "due process of law" as requiring "notice of some character reasonably calculated to bring home to a defendant the fact that an action has been commenced and the character thereof."

With this definition we find no fault. Applying it to the facts in this case, wherein has the notice given failed to measure up to that definition? Assuredly, some duty rested upon appellant to protect itself, and all it had to do was to notify the Secretary of State to forward any papers served, either to its home office or to any counsel selected by it.

Justice Taft, in the case of *Wuchter v. Pizzutti,* in discussing what constitutes due process, used the following language:

> "These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here."

The mere fact that a defendant was taken by surprise does not deprive the defendant of due process of law.

> *Penna. Fire Ins. Co. v. Gold Issue Mining Co.,* 243 U. S. 93.

APPELLANT'S CASES DISTINGUISHED AS TO FACT AND PRINCIPLES OF LAW.

Appellant relies principally upon the cases of *Wuchter v. Pizzutti*, 276 U. S. 13, and *Consolidated Flour Mills Co. v. Muegge*, 278 U. S. 559.

The case of *Wuchter v. Pizzutti* was a suit against a non-resident motorist. The right of states to enact laws governing cases of that character is clearly under the police power. Having in mind the distinction between such cases and cases of foreign corporations, Justice Taft said:

> "The cases, in which statutes have been upheld providing that non-resident corporations may properly be served by leaving a summons with a state official, where the corporation has not indicated a resident agent to be served, are not especially applicable to the present statute. *Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co.*, 243 U. S. 93; *Simon v. Southern Ry. Co.*, 236 U. S. 115; *Old Wayne Mutual Life Association v. McDonough*, 204 U. S. 8. Such corporations may properly be required to accept service through a public officer as a condition of their doing business in the state. Their knowledge of the statutory requirement may perhaps prompt frequent inquiry as to suits against them, of their appointed agent or at the office of the public official to be served, but it could hardly be fair or reasonable to require a non-resident individual owner of a motor vehicle who may use the state highways to make constant inquiry of the Secretary of State to learn whether he has been sued. Even in cases of non-resident corporations, it has been held that a statute

directing service upon them by leaving process with a state official is void if it contains no provision requiring the official, upon whom the service may be made, to give the foreign corporations notice that suit has been brought and citation served. *Southern Railway Co. v. Simon*, 184 Fed. 959, 961; *Gouner v. Missouri Valley Bridge Co.*, 123 La. 964."

In support of the last part of the above quotation, the cases of *Simon v. Southern Ry.* and *Gouner v. Mo. Valley Bridge Co.* are cited. These two cited cases do not however bear out the general principle stated. In *Simon v. Southern Ry.* defendant was not doing business in Louisiana, and the suit was for tort committed in the State of Alabama. Justice Lamar, in deciding the case, spoke as follows:

"The broader the ground of the decision here, the more likelihood there will be of affecting judgments held by persons not before the court. We therefore purposely refrain from passing upon either of the propositions decided in the courts below, and without discussing the right to sue on a transitory cause of action and serve the same on an agent voluntarily appointed by the foreign corporation, we put the decision here on the special fact, relied on in the court below, that in this case the cause of action arose within the State of Alabama, and the suit therefor, in the Louisiana Court, was served on an agent designated by a Louisiana statute. * * * The service on the Southern Railway, even if in compliance with the requirements of Act 54, was not that kind of process which could give the court jurisdiction over the person of the defendant for a cause of action arising in Alabama."

This distinction had previously been made in the case of *Penna. Fire Ins. v. Gold Issue Mining Co.,* 243 U. S. in which Justice Holmes used the following expression:

> "The defendant relies upon *Old Wayne Mutual Life Association v. McDonough,* 204 U. S. 8, and *Simon v. Southern Railway Co.,* 236 U. S. 115. But the distinction between those cases and the one before us is shown at length in the judgment of the court below, quoting a brief and pointed statement in *Smolik v. Philadelphia & Reading Coal & Iron Co., 222* Fed. Rep. 148; a statement reinforced by Cardozo, J., in *Bagdon v. Philadelphia & Reading Coal & Iron Co.,* 217 N. Y. 432. In the above mentioned suits the corporations had been doing business in certain States without authority. They had not appointed the agent as required by statute, and it was held that service upon the agent whom they should have appointed was ineffective in suits upon causes of action arising in other States. The case of service upon an agent voluntarily appointed was left untouched. 236 U. S. 129, 130. If the business out of which the action arose had been local it was admitted that the service would have been good, and it was said that the corporation would be presumed to have assented."

The case of *Gouner v. Missouri Valley Bridge Co.,* cited by Justice Taft, construed act No. 54 of the State of Louisiana of the year 1904. That act dealt with the appointment of agents by foreign corporations, but did not require foreign corporations to maintain agents within the state after permanently withdrawing therefrom. This is clearly brought out in the case of *King v. Am.*

Tank & Equipment Company, 144 So. 283, referred to above.

The decision in the case of *Consolidated Flour Mills Co. v. Muegge* was "Per Curiam" with this brief statement. "Reversed on authority of *Wuchter v. Pizzutti*, 276 U. S. 13."

The facts in this last case are that the Consolidated Flour Mills *was never authorized to do business* in the state of Oklahoma, but was doing business there in violation of law.

The Supreme Court of Oklahoma in that case makes the following pertinent remark:

> "The defendant had not obtained authority to do business in the State of Oklahoma and had not designated an agent upon whom service of process could be made."
>
> *Consolidated Flour Mills Co. v. Muegge*, 127 Okla. 295, 260 Pac. 745.

The distinction is clear. There was no element of contract between the Consolidated Flour Mills and the State of Oklahoma.

The case of *Knapp v. Bullock Tractor Co.*, 243 Fed. 543, relied upon by appellant is also easily distinguished. The defendant in that case had never been authorized to engage in business in California, and the large part of the opinion is taken up in determining whether defendant was in fact engaged in doing business there. The same reasoning applies as applies to the Muegge case.

Justice Harlan, in deciding the Old Wayne Life Ass'n case, made the following concise statement of the law:

> "Conceding then that by going into Pennsylvania, without first complying with its statute, the defendant association may be held to have assented to the service upon the Insurance Commissioner of process in a suit brought against it there in respect of business transacted by it in that Commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennylvania. Indeed, the Pennsylvania statute, upon its face, is only directed against insurance companies who do business in that Commonwealth—'in this State.' While the highest considerations of public policy demand that an insurance corporation, entering a State in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another State, although citizens of the former State may be interested in such business."

SERVICE ON ASSISTANT SECRETARY OF STATE HELD UNDER DECISION OF SUPREME COURT OF WASHINGTON TO BE SUFFICIENT COMPLIANCE WITH STATUTE AND HENCE QUESTION NOT OPEN.

Appellant contends that service of summons and complaint on the Assistant Secretary of State is not a compliance with statute. We do not feel that appellant is in any position to make such contention.

First. In the transcript of the record (P. 7-8) is shown a Sheriff's return of service, showing service to have been made upon A. M. Kitto, Assistant Secretary of State. In the same transcript (P. 14-15) is shown an affidavit of J. Grant Hinkle, Secretary of State, showing that the service was in fact made upon him. This affidavit was used by appellant in its application to the Supreme Court of Washington for a writ of prohibition. Appellant cannot successfully contend that service was made upon the Assistant Secretary, while by its own record, it shows that it was in fact made upon the Secretary of State.

Second. That contention was made in the Supreme Court of Washington. Section 10995 Remington's Compiled Statutes of Washington reads as follows:

> "The secretary of state may have one assistant secretary of state to be appointed by him in writing, and to continue during his pleasure. Such assistant secretary of state to have the power to perform any act or duty relating to the secretary of state's office, that the secretary of state has, and the secretary of state shall be responsible for the acts of said assistant."

Upon a consideration of the question, the Supreme Court held that the service of process, under the provisions of Section 3854 and Section 10995, was a sufficient compliance with the statute.

> *State ex rel Bond & Goodwin & Tucker, Inc. v. Superior Court*, 169 Wash. 688 (p. 697).

That does not leave a constitutional question open.

The Supreme Court is bound by the decision of the court of last resort upon the question of the construction of a statute.

St. Louis Southwestern Ry. v. Arkansas, 235 U. S. 350;
Penna. Fire Ins. Co. v. Gold Issue Mining Co., 243 U. S. 93;
Wick v. Chelan Electric Co., 280 U. S. 108;
Concordia Ins. Co. v. School Dist., 282 U. S. 545;
Mass. Bonding Co. v. Concrete Steel Bridge Co., 37 Fed. Rep. (2nd) 695.

NO DISCRIMINATION UNDER DIFFERENT SECTIONS OF WASHINGTON STATUTES RELATIVE TO MANNER OF SERVICE.

Some contention is made that there is a discrimination against appellant, due to the difference in manner of service upon domestic corporations where officers cannot be found, and foreign insurance corporations, by which these two classes are favored over foreign corporations which have withdrawn from the state and failed to name a statutory agent for service of process.

Even though a statute causes a diversity of treatment of corporations or individuals it is not repugnant to the constitutional guaranty of "equal protection" as long as there is a reasonable ground for such diversity of treatment. Hence a statute, bearing alike on all corporations of each class in like conditions, does not deny the equal protection of the law as long as such classification is not arbitrary and is reasonable.

The principle is well defined in the case of *Power Co. v. Saunders,* 274 U. S. 490 (cited by appellant) wherein the Court uses the following language:

> "The clause in the Fourteenth Amendment forbidding a State to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws., *Truax v. Corrigan,* 257 U. S. 312, 333; *Atchison, Topeka & Santa Fe Ry. Co. v. Vosburg,* 238 U. S. 56, 59, and extends as well to corporate as to natural persons, *Smyth v. Ames,* 169 U. S. 466, 522; *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis,* 165 U. S. 150, 154; *Santa Clara County v. Southern Pacific R. R. Co.,* 118 U. S. 394, 396. It does not prevent a state from adjusting its legislation *to differences in situation or* forbid classification in that connection; but it does require that the classification *be not arbitrary* but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."

A well considered case upon that point is *National Union Fire Ins. Co. v. Wanberg,* 260 U. S. 71. Here a statute of North Dakota, regulating companies engaged in hail insurance was assailed, on the ground that it denied to such companies the equal protection of the laws.

Justice Taft, in upholding the statute, said:

> "The statute applies to all companies engaged in such insurance. There is no discrimination and no denial of the equal protection of the laws. The fact that the time requirements of the statute may bear more heavily on foreign companies whose principal

offices may be far removed than upon those whose headquarters are within the State is a circumstance necessarily incident to their conduct of business in another State of which they can not complain. They can not expect the laws of the State to be bent to accommodate them as a matter of strict legal right, however wise it may be for a legislature to give weight to such a consideration in securing the use of foreign capital for its people. Moreover, as the business of such insurance companies is purely intrastate, *New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495, the State has power to require them to accept conditions different from those imposed on domestic corporations (*Paul v. Virginia*, 8 Wall 168; *Hooper v. California*, 155 U. S. 648, and cases cited) though this is not, of course, unlimited. *Terral v. Burke Construction Co.*, 257 U. S. 529, 532, 533."

Tested by the rule announced it can not be said that these statutes are unreasonable or arbitrary. They deal with all corporations in the same class equally.

It would be just as reasonable for a foreign insurance company to contend that it was denied "equal protection" because it has no option under the statute in naming an agent for the service of process, but must name the Insurance Commissioner. A domestic corporation is not required to name a statutory agent, it does not withdraw from the state, and the mailing of summons to last known address is not more reasonably calculated to give notice of the pendency of the suit than the service upon the Secretary of State was in case of appellant.

The cases cited by appellant under this head are clearly distinguishable. In the first case of

Kentucky Finance Corp. v. Paramount Auto Exchange, 262 U. S. 544,

the statute involved required a foreign corporation, as a condition to the maintenance of its action, to send an officer with its papers and books bearing upon the matter in controversy from its domicile to the state where the action is brought, in order to submit to an adversary examination before answer, but did not subject non-resident individuals to such examination.

The Court in its decision uses the following language:

> "Here the statute authorized the imposition, and there was imposed, on the plaintiff a highly burdensome requirement because of its corporate origin,—a requirement which under the statute could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Milwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit."

In the case of *Power Mfg. Co. v. Saunders,* 274 U. S. 490, the statute of Arkansas restricted the venue in

transitory actions, if against a domestic corporation, to the county of its place of business, or in which its chief officer resides; if against a natural person, to the county where he resides or is found; if against a foreign corporation to any county of the state.

The Court rests its decision in the following language:

> "Of course the restricted venue as to domestic corporations and individuals is prompted by considerations of convenience and economy; but these considerations have equal application to foreign corporations. So far as the plaintiffs in such actions are affected, it is apparent that there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary."

Clearly those provisions were unreasonable and arbitrary.

CONCLUSION.

From the foregoing it is our contention that the section of the statute assailed is not in violation of the Fourteenth Amendment to the Federal Constitution; that, upon the facts shown, the service upon appellant through the Secretary of State, was such as to constitute "due service of process"; and that there is nothing in the statute which denies to appellant "equal protection."

For the reasons set forth the judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

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APPENDIX.

Sec. 3852. Power of, to Do Business in This State.

Any corporation incorporated under the laws of any state or territory in the United States, or of any foreign country, state, or colony, for any of the purposes for which domestic corporations are authorized to be formed under the laws of this state, shall have full power and is hereby authorized to sue and to be sued in any court having competent jurisdiction, to acquire, purchase, hold, mortgage, sell, convey, or otherwise dispose of, in the corporate name, all real estate or personal property necessary or convenient to carry into effect the objects and purposes of its corporation, and also any interest in real estate, by mortgage or otherwise do (due) to or loans made by such foreign corporations within the boundaries of this state, either prior to or after the passage of this act, and generally do and perform every act and transact every kind of business within this state in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of this state, by a compliance with all the conditions prescribed by the next two succeeding sections of this chapter: Provided, however, that this chapter shall not be (so) construed as to allow such foreign corporation to transact business within the state on more favorable conditions than are prescribed by law for a similar corporation organized under the laws of this state: And provided further, that no corporation, the majority of the capital stock of which is owned by aliens other than those who in good faith have declared their intention to become citizens of the United States, shall acquire the ownership of any lands in this state other than lands containing valuable deposits of minerals, metals, iron, coal, or fireclay, and the necessary land for

mills and machinery to be used in the development thereof, and the manufacture of the products therefrom, except where acquired under mortgage, or in good faith in the ordinary course of justice in the collection of debts: Provided, further, that no foreign corporation which is hereafter organized which has among its other powers the business of dealing in real estate, and buying and selling the same, and for the purpose of carrying on a real estate brokerage business, shall be permitted to transact such business of buying and selling and dealing in real estate, and carrying on a brokerage business therein in this state; but this prohibition shall not extend to any other business for the transaction of which such corporation may be organized.

Sec. 3853. Certified Copy of Charter, etc., to be Filed and Recorded.

Such corporations shall cause to be filed and recorded in the office of the secretary of state a certified copy of its charter, articles of incorporation, memorandum of association, or certificate of incorporation, certified to by the officer who is the custodian of the same according to the laws of the state or territory, country or colony, where such corporation is incorporated, or who is authorized to issue certificates of incorporation according to the laws of such state, territory, or foreign country or colony. The instruments herein required to be filed and recorded shall be attested by such certifying officer under his hand and seal of office, which attestation shall be prima facie proof of the facts therein stated, and of the genuineness of the certificate. If such officer has no official seal, his certificate shall state that fact over his signature, and thereupon the secretary of state, or of the territory, in case of corporations within the United States, and the consul general, consul, vice-consul, deputy consul, consular agent, or commercial agent of the Uni-

ted States, at or nearest to the place where such certificate is made, in the case of corporations not within the United States, shall certify under his hand and seal of office to the genuineness of the signature of the officer making the certificate, and to the fact that at the time of making such certificate the person making the same held the office described in the certificate.

Sec. 3854. Appointment of Agent to be Filed and Recorded.

Such corporations shall also constitute and appoint an agent, who shall reside at the place in the state where the principal business of the corporation is to be carried on, to be designated as hereinafter required. Such appointment shall be in writing, signed by the president or chief officer of such corporation, and shall be attested by its corporate seal, and shall contain the name of the agent, his place of residence and the place where the principal business of such corporation is be carried on, and shall authorize such agent to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within this state in which such corporation may be a party. The signature of such president or chief officer, attested by the corporate seal to such written appointment, shall be sufficient proof of the appointment of such agent. Such appointment, when duly executed, shall be filed for record in the office of the secretary of state by such corporation, and shall be there recorded; and such corporation shall have and keep continually some resident agent, empowered as aforesaid during all the time such corporation shall conduct or carry on any business within this state, and service of any process, pleading, notice or other paper shall be taken and held as due service on such corporation. Such corporation may change its agent or its principal place of business, from time to time, by filing and

recording with the secretary of state a new appointment, stating the change of such agent or the change in the principal place of business; and in the event such foreign corporation shall withdraw from this state and cease to transact business therein it shall continue to keep and maintain such agent within this state upon whom service of process, pleadings and papers may be made, until the statute of limitations shall have run against anyone bringing an action against said corporation, which accrued prior to its withdrawal from this state. In case said corporation shall revoke the authority of its designated agent after its withdrawal from this state and prior to the time when the statutes of limitations would have run against causes of action accruing against it, then in that event service of process, pleadings and papers in such actions may be made upon the secretary of state of the state of Washington, and the same shall be held as due and sufficient service upon such corporation.